

# HOLTZMAN VOGEL JOSEFIAK PLLC

Attorneys at Law

45 North Hill Drive  
Suite 100  
Warrenton, VA 20186  
p/540-341-8808  
f/540-341-8809

January 27, 2015

Jeff S. Jordan  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
2015 JAN 28 AM 10:07  
OFFICE OF THE  
COMMISSIONER

**Re: Response of NRCC in MUR 6908**

Dear Mr. Jordan,

This response to the Complaint designated Matter Under Review 6908 is submitted on behalf of the National Republican Congressional Committee (NRCC), by the undersigned counsel. American Democracy Legal Fund filed the Complaint in this matter on or about November 25, 2014.<sup>1</sup>

The Complaint alleges, "[b]ased on recent press reports, in the months leading up to the November 2014 election, and perhaps going back even further than that, the NRCC

<sup>1</sup> See ADLF Files Complaint Against NRCC, Crossroads, AAN for Illegal Twitter Coordination (Nov. 25, 2014), <http://americandemocracy.org/adlf-files-complaint-against-nrcc-crossroads-aan-for-illegal-twitter-coordination/>. American Democracy Legal Fund is a recently established Internal Revenue Code § 527 organization created by David Brock to serve as an "overtly partisan watchdog group." Kenneth P. Vogel, *Media Matters' David Brock expands empire*, Politico (Aug. 13, 2014), <http://www.politico.com/story/2014/08/david-brock-citizens-for-responsibility-and-ethics-in-washington-110003.html>. Mr. Brock claims to believe that "our experience has been that the vast amount of violations of the public trust can be found on the conservative side of the aisle." *Id.* His new organization exists solely to harass Republicans and conservatives with frivolous complaints and sensational allegations.

The Executive Director of American Democracy Legal Fund is Brad Woodhouse. Mr. Woodhouse, who signed the Complaint in this matter, served as the Democratic National Committee's communications director in 2012, when, according to a *Huffington Post* report, "the Democratic Party shared information about advertising buys through a seemingly unconnected Twitter account called AdBuyDetails." Paul Blumenthal, *Democrats Used Twitter, Too, To Coordinate With Outside Groups*, *Huffington Post* (Nov. 21, 2014), [http://www.huffingtonpost.com/2014/11/20/democrats-twitter-coordination\\_n\\_6188852.html](http://www.huffingtonpost.com/2014/11/20/democrats-twitter-coordination_n_6188852.html).

appears to have been illegally coordinating with outside groups such as AAN and American Crossroads through the repeated exchange of encrypted internal political polling information posted on hidden Twitter webpages.” Complaint at 1. According to the Complainant’s theory, “[t]his ongoing exchange of non-public strategically material information constitutes ‘coordination’ under the Act and means that purported ‘independent expenditures’ sponsored by AAN and American Crossroads were in fact, excessive, illegal, in-kind contributions to the NRCC.” *Id.* at 1-2.

The NRCC denies the Complaint’s allegations of illegal coordination with American Crossroads and American Action Network. Any message posted on Twitter – ~~by any person at any time regarding any subject – constitutes publicly available~~ information. As a result, a message posted on Twitter cannot serve as the basis for impermissible coordination. The Complaint acknowledges that the Twitter messages at issue were placed “on a public website,” *see* Complaint at 7, but nevertheless hopes the Commission will incorporate new requirements into its existing coordination regulations. The Complaint also fails to set forth any facts that demonstrate (or even establish the possibility) that any *specific* communications created, produced, or distributed by any other respondent (*i.e.*, American Crossroads or American Action Network) were based, in whole or in part, on material, non-public information about the NRCC’s campaign plans, projects, activities or needs. In short, the Complaint makes allegations that, even if taken as true, do not establish a violation of the Act. This Complaint should be expeditiously dismissed.

## **I. Factual Background**

The Complaint is based entirely on a CNN report published on November 17, 2014, and a follow-up report published the next day.<sup>2</sup> CNN’s report is based on an anonymous source who supposedly told the reporter that two Twitter accounts were used “to share internal polling data” and that “[a]t least two outside groups and a Republican campaign committee had access to the information posted to the accounts, according to the source. They include American Crossroads, the super PAC founded by Karl Rove; American Action Network, a nonprofit advocacy group, and the National Republican Congressional Committee, which is the campaign arm for the House GOP.”<sup>3</sup>

The account provided by CNN and its anonymous source is inaccurate and badly misleading. While it may be true that the named organizations “had access to the information posted to the accounts,” so too did every other person in the world with Internet access. The two Twitter accounts were not blocked in any way and *anyone* who viewed either account had full access to all of the messages posted by those accounts.

<sup>2</sup> *See* Chris Moody, *How the GOP used Twitter to stretch election laws*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>; Chris Moody, *See the GOP’s coded tweets*, CNN (Nov. 18, 2014), <http://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots/>.

<sup>3</sup> Chris Moody, *How the GOP used Twitter to stretch election laws*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>.

The Twitter accounts identified in CNN's report (@BrunoGianelli44 and @TruthTrain14) were created and used by two NRCC employees. Each account was created several months before any messages were posted during the summer of 2014. The accounts did not exist, and were not used, during any previous election cycle.

The Complaint repeatedly emphasizes the "encoded," "encrypted," and "secret" nature of the messages posted to Twitter. The Twitter posts, however, are decidedly less mysterious than the Complaint suggests, and are immediately recognizable as "topline" political polling data to anyone who is reasonably familiar with polling data. The message posted by @TruthTrain14 on August 1, 2014, is typical:

IL-39/37-37/36-28/10-36/19-44/51-7/21/14-12

"IL" obviously means Illinois, and the final number, "12," indicates the congressional district number. This message refers to a poll of IL-12. The first set of numbers, "39/37" is the generic ballot result. (The generic ballot question is, "If you voted today, would you vote for the Republican candidate or the Democratic candidate for the U.S. House?") The next set of numbers represents the head-to-head matchup of the two U.S. House candidates. In the example above, the Republican candidate would receive 37% of the vote, while the Democratic candidate would receive 36%. The next three sets of numbers are favorable/unfavorable ratings. "28/10" indicates that 28% of respondents view the Republican candidate favorably, while 10% hold an unfavorable view of the Republican candidate. "36/19" provides the same information for the Democratic candidate. "44/51" represents the President's favorable/unfavorable ratings. "7/21/14" is the date the poll was taken, July 21, 2014. Taken together, the message consists of what is known as "topline" data, or the overall responses to specific questions, presented as a basic percentage.

In a November 17, 2014, article, a Washington Post reporter characterized the tweets at issue as "lightly coded messages," and, with no acknowledged assistance from polling professionals, was able to explain the meaning of the messages to readers.<sup>4</sup>

On November 18, 2014, CNN published most of the messages posted to @BrunoGianelli44 and @TruthTrain14.<sup>5</sup> CNN's screen captures indicated that 98 messages were posted by @BrunoGianelli44, and 87 messages were posted to @TruthTrain14. CNN captured 84 of @BrunoGianelli44's 98 messages, and 75 of @TruthTrain14's 87 messages. At this time, we do not have access to either account's messages and cannot produce the messages not published by CNN.

<sup>4</sup> See Philip Bump, *Republicans, Twitter and the brave new world of campaign/outside group coordination*, Washington Post (Nov. 17, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/11/17/republicans-twitter-and-the-brave-new-world-of-campaignoutside-group-coordination/>.

<sup>5</sup> See Chris Moody, *See the GOP's coded tweets*, CNN (Nov. 18, 2014), <http://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots/>.

1944-1944

1944-1944

1944-1944

1944-1944

1944-1944

1944-1944

1944-1944

MUR 6780 (Terri Lynn Land), First General Counsel's Report at 7-8 ("First, the Complaint provides no direct evidence that the communications at issue were made at the request or suggestion of the Land Committee, that the Land Committee assented to any suggestion by these groups with respect to the communications, that the Land Committee was materially involved in decisions regarding the communications, or that there were substantial discussions between the Land Committee and any of these groups."). The same conclusions are warranted here.

It is well-established that "[t]he Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true." MUR 4960 (Clinton), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1-2; MUR 5467 (Moore), First General Counsel's Report at 5 (quoting MUR 4960).

Finally, the Complaint is based solely on a news report featuring an anonymous source. The Complainant does not claim any personal knowledge of the alleged events. Accordingly, the Complaint lacks "specific facts from reliable sources." See MUR 6002 (Freedom's Watch), Statement of Reasons of Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Donald F. McGahn at 6. Three Commissioners previously found that a speculative or unspecific account from an anonymous source may not justify a reason to believe finding. See *id.*

In addition to these shortcomings, the Complaint also fails to allege a substantive violation of the Act.

**B. The Complaint's Allegations, Even If True, Do Not Constitute A Violation Of The Commission's Coordination Regulations**

The Complaint is premised on a novel legal theory that the Commission has never before adopted – namely, that information may be obtained from a publicly available source, but still not qualify for the Commission's "public information" exemption in the coordination regulations. According to the Complainant, the "public information" exemption is satisfied only if information meets certain unspecified standards that appear nowhere in the Commission's regulations, but that nevertheless require that publicly available information is sufficiently public, readily located, and adequately comprehensible. The Complainant does not identify any instance in which the Commission has ever discussed these additional requirements, where the boundaries of these new standards might lie, or how these requirements could possibly be derived from the straightforward language of the Commission's regulation.

## 1. A Twitter Message Is A "Publicly Available Source"

The Complainant recognizes that its coordination theory suffers several flaws. First, a message posted via Twitter is a "publicly available source," available to the entire world to see. However, the Complaint contends that "[t]he messages were not public information because they were encoded in a format that only members of Respondents' scheme could understand." Complaint at 1.<sup>7</sup> The Commission has *never* before suggested that its concept of "public information" involved any consideration other than whether or not the information was "obtained from a publicly available source."

Four of the five conduct standards set forth at 11 C.F.R. § 109.21(d) are not satisfied where "the information material to the creation, production, or distribution of the communication was obtained from a publicly available source." See 11 C.F.R. §§ 109.21(d)(2) (material involvement), 109.21(d)(3) (substantial discussion), 109.21(d)(4) (common vendor), and 109.21(d)(5) (former employee or independent contractor). (As explained in more detail below, the Commission's 2003 coordination rulemaking explains that the "request or suggest" standard does not include requests or suggestions made to the general public, including through publicly available sources.) Neither the Commission's regulation nor its Explanation and Justification impose any standard for satisfying this exemption beyond "*was obtained from a publicly available source.*" The Commission explained:

[T]he person paying for a communication may demonstrate that media buying strategies regarding a communication were based on information obtained from a television station's public inspection file, and not on *private* communications with a candidate or political party committee. Other sources of public information for purposes of the safe harbor include, but are not limited to: Newspaper or magazine articles; candidate speeches or interviews; materials on a candidate's Web site or other publicly available Web site; transcripts from television shows; and press releases.

Final Rule on Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006). The sole focus of the regulation is on the source of the information, not whether that information was presented in a sufficiently understandable manner. The Commission's regulations do not ask whether the information was "hidden" or "could be understood by the public." Rather, the regulations simply ask whether the information "*was obtained from a publicly available source.*" See, e.g., MUR 6120 (Freedom's Watch, Inc.), Factual and Legal Analysis at 6 (concluding that "safe harbor for publicly available

<sup>7</sup> See also Complaint at 6-7 (claiming that the Respondents "hid[] their communications on a public website" and "shared the private polling data on Twitter, but formatted the data in such a way that it could not be understood by the public"); Complaint at 7 ("The hidden Twitter messages were not offered to the public generally; they were posted to anonymous Twitter accounts that only certain groups knew existed. They were also encoded. Members of the public who were not privy to Respondents' translation formula could not decipher what the posts meant.").

1604462554

sources" applies to images available on the Internet); MUR 6038 (Lamborn), Statement of Reasons of Chairman Matthew S. Petersen, Vice Chair Cynthia L. Bauerly, Commissioner Caroline C. Hunter, Commissioner Donald F. McGahn, Commissioner Steven T. Walther, Commissioner Ellen L. Weintraub at 4 ("This raises the question whether the absentee voter data was obtained from a 'publicly available source,' and is thus excluded from the 'material involvement,' 'substantial discussion,' 'common vendor,' and 'former employee' conduct standards.").

Twitter is a well-known, freely available source that any member of the general public has the ability to access, so if any information was obtained from the Twitter messages at issue, that information was, by definition, information "obtained from a publicly available source." This simple observation is where the inquiry ends, as the Commission has previously acknowledged. For example, in MUR 6038 (Lamborn), the Commission never asked how easily one could obtain the information at issue in that matter ("raw data obtained from the El Paso County Clerk and Recorder" or "unenhanced absentee voter data"), or whether that information was readily discernible by enough people. See MUR 6038 (Lamborn), Factual and Legal Analysis (Club for Growth State Action) at 7-8. Instead, the Commission asked only whether that information derived from a publicly available source. In the present matter, it is self-evident that the information at issue "was obtained from a publicly available source."

## 2. The Twitter Messages Were Not "Requests or Suggestions"

The Complaint alleges that "the NRCC posted polling information for certain congressional races on its hidden Twitter pages as coded requests or suggestions for outside groups to get involved by pouring money and other resources into those races." Complaint at 5 (emphasis in original).

The phrase "request or suggest" is not further defined in the Commission's regulations. However, the ordinary meaning of "request" includes "the act or an instance of asking for something,"<sup>8</sup> or to "politely or formally ask for."<sup>9</sup> The term "suggest" means "to mention (something) as a possible thing to be done, used, thought about, etc."<sup>10</sup> or to "put forward for consideration" or "state or express indirectly."<sup>11</sup>

The Commission explained in 2003 that "[a] request or suggestion encompasses the most direct form of coordination, given that the candidate or political party committee communicates desires to another person who effectuates them." Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). It is difficult to see how a Twitter message consisting of a series of polling numbers could

<sup>8</sup> See <http://www.merriam-webster.com/dictionary/request>.

<sup>9</sup> See [http://www.oxforddictionaries.com/us/definition/american\\_english/request?searchDictCode=all](http://www.oxforddictionaries.com/us/definition/american_english/request?searchDictCode=all).

<sup>10</sup> See <http://www.merriam-webster.com/dictionary/suggest?show=0&t=1421788951>.

<sup>11</sup> See [http://www.oxforddictionaries.com/us/definition/american\\_english/suggest?searchDictCode=all](http://www.oxforddictionaries.com/us/definition/american_english/suggest?searchDictCode=all).

amount to a "direct form or coordination," let alone "the most direct form of coordination." A brief recitation of "topline" polling numbers in no way "communicates desires" – rather, it communicates information of a factual nature that must then be interpreted and put to some use. "Topline" polling numbers do not carry with them any use instructions. The Commission also explained that the "request or suggestion" standard does not apply where the "requests or suggestions" are made "to the public generally." Specifically, the Commission wrote:

The "request or suggestion" standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).

Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

Even if one were to misconstrue a particular Twitter posting as a "request or suggestion" directed at some particular person with the intention that that person take some particular action based on the information contained in that Twitter posting, the fact remains that the message was "posted on a web page that is available to the general public" which "does not trigger the conduct standard in paragraph (d)(1)." See also MUR 6411 (Pelosi, *et al.*), First General Counsel's Report at 12-15 (discussing "request or suggestion" standard).

### 3. The Twitter Messages Do Not Constitute "Substantial Discussion" and Did Not Convey Plans, Projects, Activities, or Needs

The Complaint also contends (albeit without much explanation) that the "substantial discussion" provision of the conduct prong is also implicated. See Complaint at 4-6. Under the Commission's regulations, the "substantial discussion" provision asks whether "[t]he communication is created, produced, or distributed *after one or more substantial discussions about the communication* between the person paying for the communication ... and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee." 11 C.F.R. § 109.21(d)(3) (emphasis added).<sup>12</sup>

<sup>12</sup> As the Commission recounted in its 2002-2003 coordination rulemaking, "[i]n BCRA, Congress also directed the Commission to address 'payments for communications made by a person *after substantial discussion about the communication* with a candidate or political party.'" Final Rule on Coordinated and Independent Expenditures 68 Fed. Reg. at 434 (quoting Public Law 107-155, sec. 214(c)(4) (March 27, 2002)) (emphasis added).



Even if one or more of the named Respondents had "communicated at some point," as speculatively hypothesized in the Complaint at page 6, the alleged communication that the Complainant insists must have taken place was *not* a communication or discussion "about *the communication* between the person paying for *the communication* ... and ... a political party." See 11 C.F.R. § 109.21(d)(3) (emphasis added). Rather, the communication that the Complainant imagines took place was a communication about "what medium they would use to share the information and what formula they would use to communicate." Complaint at 6. The Complaint does not allege that any of the named Respondents produced a communication after engaging in a "substantial discussion" about that communication with another named Respondent. The alleged communication that the Complaint describes does not satisfy the requirements of the Commission's "substantial discussion" provision.

The Commission's regulations provide that "[a] discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication." 11 C.F.R. § 109.21(d)(3). The Commission further explained that "the substantiality of the discussion is measured by the materiality of the information conveyed in the discussion. Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. at 435.

As explained above, "topline" polling numbers do not convey material information about a "political party committee's campaign plans, projects, activities, or needs." It is well known that political party committees commission, conduct, and use polls, and it is well known that party committees focus their efforts on the so-called "battleground" districts, that is, districts that are competitive. The NRCC publicly announced races that it believed were competitive well in advance of the 2014 elections. For example, the NRCC began announcing its "Patriot Program Members" on April 22, 2013.<sup>13</sup> The "Patriot Program" supports incumbent members of the U.S. House who may be vulnerable.<sup>14</sup> Seven months later, on November 21, 2013, the NRCC identified 36 candidates who were "on the radar," which is "the first of three levels in the 'Young Guns' program."<sup>15</sup> The NRCC subsequently identified a total of 45 "Young Guns," who are "candidates [who] represent the most competitive congressional seats in the 2014

<sup>13</sup> See NRCC Press Release, *NRCC Announces First Round of Patriot Program Members* (April 22, 2013), <https://www.nrcc.org/2013/04/22/nrcc-announces-first-round-of-patriot-program-members/>.

<sup>14</sup> See Emily Cahn, *House GOP Adds 9 Vulnerable Incumbents to Patriot Program*, Roll Call (July 21, 2013), <http://tr.rollicall.com/house-gop-adds-9-vulnerable-incumbents-to-patriot-program/>.

<sup>15</sup> See NRCC Press Release, *36 Congressional Candidates Announced "On the Radar" as Part of NRCC's 'Young Guns' Program* (Nov. 21, 2013), <https://www.nrcc.org/2013/11/21/36-congressional-candidates-announced-radar-part-nrccs-young-guns-program/>.

election cycle.”<sup>16</sup> A separate program, known as the “Vanguard” program, identifies and supports “candidates running in Republican-leaning open seats.”<sup>17</sup>

Taken together, the Twitter messages posted by the two Twitter accounts at issue reveal nothing more than the fact that the NRCC identifies competitive districts and conducts polling in those districts. In many, if not most, cases, the NRCC had already identified these districts as “competitive” in 2013. The “topline” polling results included in the Twitter messages at issue revealed the same basic information that is aggregated at Real Clear Politics’ polling section (realclearpolitics.com) and various other political news sites.

#### 4. Twitter Messages Do Not Require Disclaimers

The Complaint characterizes the two Twitter accounts at issue as “hidden Twitter accounts” and “anonymous Twitter accounts.” See Complaint at 2, 3, 7. According to the Complaint, “the two hidden Twitter pages exposed by CNN were not publicly associated or linked in any way to Respondents or their official Twitter pages.” Complaint at 3. This is legally irrelevant and does not change the fact that both “Twitter pages” constitute publicly available information. Furthermore, a Twitter page or message is not a “website[] of [a] political committee” or a “public communication,” meaning that existing Commission regulations do not require the NRCC to place a disclaimer on a Twitter message. See 11 C.F.R. §§ 110.11(a), 100.26. Accordingly, it is immaterial that the two Twitter accounts at issue were “not publicly associated or linked in any way to Respondents” – they were not required to be.

### III. Conclusion

For the reasons set forth above, the Complaint should be dismissed.

Sincerely,



Christine Martin  
Deputy Counsel  
NRCC

Thomas J. Josefiak  
Michael Bayes  
HOLTZMAN VOGEL JOSEFIK PLLC  
Counsel for NRCC

<sup>16</sup> See NRCC Young Guns, <http://www.gopyoungguns.com/>.

<sup>17</sup> See NRCC Vanguard, <http://www.gopyoungguns.com/vanguard/>.